United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Signed

76-6060

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

CONNECTICUT NATIONAL BANK,
ABRAHAM D. SLAVITT, and
CHARLES SALESKY, Executors
of the Estate of
FRANK H. JAMES, Deceased,

Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA,

Defendant-Appellee

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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TABLE OF CONTENTS

CITATIONS

Cases:

Cases (continued): Page

Cases (continued): Page

Statutes:

Miscellaneous:

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STATEMENT OF THE ISSUES PRESENTED

1. Whether the District Court correctly held that the portion of the charitable remainder bequest that was subject to invasion for the "benefit" of the noncharitable income beneficiaries was not presently ascertainable, and hence that it was not deductible under Section 2055 of the Internal Revenue Code of 1954.

2. Whether the District Court correctly held that a widow's allowance of $30,000 under Connecticut law constitutes a terminable interest under Section 2056(b) of the Internal Revenue Code, and thus that it does not qualify for the marital deduction.

STATEMENT OF THE CASE

This appeal involves a suit by the executors of the estate of Frank H. James, deceased, for refund of $30,106.34 in federal estate taxes, together with interest. (R. 5a-9a.)[1/] The case was decided by the District Court (Honorable Jon O. Newman) after reference to a United States Magistrate for decision on cross-motions for summary judgment.[2/] The court's decision (R. 41a-45a), which was filed on March 1, 1976, is unofficially reported at 76-1 U.S.T.C., par. 13,132. Judgment in favor of the Government, dismissing the executor's complaint, was entered on March 3, 1976. (R. 3a, 46a.) The estate's notice of appeal was timely filed on March 31, 1976. (R. 3a.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

The facts underlying the issues on this appeal may be summarized as follows:

Charitable deduction issue

Frank H. James died testate on September 13, 1969. Taxpayers are the duly qualified executors of his estate, which was probated in Norwalk, Connecticut. After making certain specific bequests, James' will provided that the residue of his estate be paid to named trustees to be held in trust. The trustees were to divide the residue into two shares, one consisting of 75 percent of the residue, and the other consisting of 25 percent. The 75-percent share was to be held for the benefit of the decedent's widow, Ada B. James, and the 25-percent

1/ "R." references are to the separately bound record appendix.

2/ The magistrate's ruling on the motions for summary judgment was endorsed "so ordered" by the District Judge. (R. 45a.) The District Judge had earlier denied the Government's motion to vacate his reference of the case to the magistrate, as well as the Government's motion under 28 U.S.C. §1292(b) for certification of an interlocutory appeal on the question of the reference.

share for the benefit of the decedent's brother, William R. James. The trustees were given complete discretion to distribute the income of the trust to the beneficiaries in accordance with these ratios, and any undistributed income was to be added to the principal of the trust estate. (R. 26a-28a, 41a-42a.)

The trustees were also authorized to distribute limited amounts of principal to the decedent's widow and brother. Article FIFTH of the will thus provided as follows (R. 29a):

> III. If my Trustees, in their sole and uncontrolled discretion, shall at any time during the administration of the Trust created, deem it advisable to pay over or apply the principal of any of the shares to or for the benefit of the respective life income beneficiaries, then I authorize my said Trustees at any time to pay over from the principal of said respective Trusts such amounts as my Trustees shall allow but subject always to the following limitations:
>
> (A) To or for the benefit of my wife, ADA B. JAMES, up to a maximum of Seven Thousand Five Hundred ($7,500) Dollars during any one year, to be cumulative, but such payments shall in no event exceed in the aggregate the sum of Seventy-five Thousand ($75,000) Dollars and this power of invasion is limited accordingly.
>
> (B) To or for the benefit of my brother, WILLIAM R. JAMES, up to a maximum of Two Thousand Five Hundred ($2,500) Dollars during any one year, to be cumulative, but such payments shall in no event exceed in the aggregate the sum of Twenty-five Thousand ($25,000) Dollars and this power of invasion is limited accordingly.

2/ (continued)
It is the policy of the Department of Justice to oppose references to magistrates to render decisions in dispositive matters, since, as the Acting Attorney General pointed out in Order No. 557-73, issued on December 4, 1973 (28 C.F.R., §50.11), applicable Supreme Court and other federal decisions have held that the use of magistrates as special masters to render decisions in such circumstances is inappropriate. _Labuy_ v. _Howes Leather Co._, 352 U.S. 249 (1957); cf. _T.P.O., Inc._ v. _McMillen_, 460 F. 2d 348 (C.A. 7, 1972). Thus, we would oppose any reference of a dispositive element of this case, in the event this Court reverses the judgment below and remands for further proceedings in the District Court (see fn. 10, p. 24, _infra_). Cf. _Mathews_ v. _Weber_, 44 U.S. Law Week 4065 (Sup. Ct., Jan. 14, 1976).

The will provided that the trust was to terminate on the death of the survivor of the decedent's widow and brother, and that the remaining trust corpus was to be distributed to various charitable organizations. (R. 30a-32a.)[3/]

On the federal estate tax return, the estate claimed a charitable deduction of $398,276.05, which equalled the present value of the trust remainder without reduction for any invasion of principal on behalf of the income beneficiaries. The Internal Revenue Service determined that no deduction was allowable to the extent that trust corpus could be invaded for the benefit of the income beneficiaries. Accordingly, the Service disallowed $79,124.87 of the claimed deduction--representing a reduction equal to the present value of the amount by which the trust corpus could be invaded for the income beneficiaries over their respective life expectancies--and allowed the remaining $319,151.18 of the deduction that the executors had claimed. (R. 18a.)

The estate paid the resulting deficiency, as well as the deficiency resulting from the partial disallowance of the marital deduction, discussed <u>infra</u>. It instituted this suit when its claim for refund was disallowed. (R. 6a-8a.) In the District Court, the estate and the Government filed cross-motions for summary judgment. (R. 12a, 15a-16a.) The estate filed the affidavit of a trust officer of the Connecticut National Bank in support of their motion, which indicated that the decedent's widow and brother were of advanced age, that the available resources of both exceeded their modest needs, and thus

3/ In a codicil to his will, the decedent increased the number of organizations that were to receive the charitable remainder, and also modified the portions of the remainder that some of those organizations were to receive. (R. 37a-39a.)

that no invasion of the charitable remainder for the benefit of the income beneficiaries was foreseen. (R. 17a-23a.)

The District Court found for the Government. The court concluded that the decedent's will failed to establish an objective standard to govern the trustees' exercise of the power of invasion for the benefit of the decedent's widow and brother, and that to the extent the charitable remainder could be depleted under the power, the remainder was not "presently ascertainable" within the meaning of Section 2055 of the Internal Revenue Code of 1954 and the Treasury Regulations. The court thus sustained the Government's partial disallowance of the charitable deduction. (R. 41a-42a.)

Marital deduction issue

Following the decedent's death, his widow's guardian ad litem made written application to the Probate Court for the District of Norwalk, Connecticut, for a widow's allowance during the settlement of the estate. (R. 40a.) On December 29, 1969, the court granted the widow an allowance of $2,500 per month for a period of one year from the date of the decedent's death. The court's order provided (R. 40a)--

> * * * That the sum of Two Thousand Five Hundred ($2,500) Dollars per month for twelve months from the date of death of said deceased be and the same is hereby allowed to the surviving spouse of said deceased, for her support out of said estate, and said allowance shall vest in said spouse and shall not terminate with the subsequent death or remarriage of said spouse, and the executors of the will and codicil thereto of said deceased are hereby directed to pay over the amount so allowed to said widow pursuant to this order.

The $30,000 allowance was included as part of the marital deduction claimed on the estate tax return. The Internal Revenue

Service determined that the allowance was a terminable interest that did not qualify for the marital deduction, and increased the estate tax accordingly. (R. 42a-43a.)

The District Court agreed that the widow's allowance did not qualify for the marital deduction. The court concluded that under Connecticut law, the right to an allowance did not become indefeasibly vested in the widow at the moment of the decedent's death, but that it was contingent upon the granting of an allowance by the probate court. (R. 43a-45a.)

Judgment was entered dismissing the complaint as to both the charitable remainder and marital deduction issues. (R. 46a.) The estate appeals.

SUMMARY OF ARGUMENT

1. The charitable deduction issue

The first issue on this appeal involves the question whether the present value of a charitable remainder bequest is deductible in full from the gross estate, despite the fact that $100,000 of the trust corpus may be depleted through the trustees' power to invade principal for the "benefit" of the income beneficiaries. Section 2055 of the Internal Revenue Code of 1954 and the applicable Treasury Regulations allow a deduction for a charitable remainder bequest only to the extent it is "presently ascertainable." This requirement has long been interpreted to mean that when the bequest is subject to a power of invasion, the exercise of the power must be limited by an objective, ascertainable standard. Only when the standards governing the power are thus limited can the amount of the bequest that will eventually pass to charity be accurately measured as of the time of the decedent's death.

Here, the trustees are empowered to invade up to $7,500 during any one year for the "benefit" of the decedent's widow, and up to $2,500 per year for the "benefit" of his brother. Invasions for the widow's benefit cannot exceed $75,000 during her lifetime, and for the decedent's brother, may not exceed $25,000. The estate argues that these dollar limits themselves constitute an ascertainable standard. The argument, however, is spurious. The annual and lifetime maximums serve merely to prescribe the portion of trust corpus which the decedent intended to be subject to a power of invasion. To the extent trust corpus

exceeded those maximums, it was exempt from invasion and is undisputedly deductible. What is disputed here, however, is whether the trustees' power to invade corpus up to the ceiling prescribed by those annual and lifetime maximums is governed by an ascertainable standard. The maximums themselves give rise to that issue; they do nothing to resolve it in the estate's favor.

The estate next argues that an ascertainable standard is present here because the power to invade is to be exercised for the "benefit" of the income beneficiaries. It has been uniformly held, however, that the term "benefit" does not prescribe an objective standard. A trustee could invade principal for virtually any reason, and thereby "benefit" the income beneficiary. The statute, however, requires that the purposes for which invasions are permitted be narrowly circumscribed, so that a highly reliable appraisal of the amount the charity will receive will be available. The loose standard of "benefit" falls far short of satisfying that requirement.

The estate also argues that Connecticut law imposes an ascertainable standard on the power to invade, because Connecticut courts would construe that power narrowly to preserve the charitable remainder. But the will unequivocally demonstrates the decedent's intention that the income beneficiaries be permitted to benefit from the trust corpus, and as this Court only recently recognized in City Trust Co. v. United States, 497 F. 2d

716 (1974), Connecticut courts would not interfere with a power of invasion in such circumstances--even at the expense of charitable remaindermen.

We submit that the power of invasion here is not governed by an objective standard, and that no deduction can be allowed for the portion of the charitable remainder that is susceptible to the exercise of that power. The decision below should be affirmed.

2. The marital deduction issue

Section 2056(a) of the 1954 Code allows a "marital deduction" from the decedent's gross estate for certain interests in property passing from the decedent to his surviving spouse. Section 2056(b) precludes this deduction as to "terminable" interests, i.e., those in which the rights of the surviving spouse might fail upon the occurrence of a contingency, resulting in the enjoyment of any part of the property by a person other than the surviving spouse. The second issue on this appeal is whether the $30,000 widow's allowance awarded to the decedent's spouse under Connecticut law qualifies for the marital deduction, as the estate contends, or whether the allowance was a nondeductible terminable interest, as the District Court held.

The principles to be applied in determining whether a widow's allowance qualifies for the marital deduction were established in Jackson v. United States, 376 U.S. 503 (1964). The terminability of the widow's interest in an allowance is to be determined on the basis of that interest as it existed at the moment of the decedent's death. An allowance will avoid the straits of the terminable interest rule only if the right to an allowance became indefeasibly vested in the widow at that time.

Those principles are not satisfied by the widow's allowance in this case. Under Connecticut law, the right to a widow's allowance is a matter lying within the discretion of the state's probate courts. The statute authorizing an allowance clearly provides that the probate court may order an allowance whenever

it is determined to be necessary for the widow's support in view of her circumstances after the husband's death, and Connecticut decisions establish that an allowance is to be denied when the need for such support is not demonstrated. The surviving spouse thus does not acquire an indefeasible right to an allowance at the time of death, but merely a right to petition the probate court seeking an allowance. The widow's interest in an allowance is plainly a terminable one, because at the moment of death, the interest remains contingent upon the approval of the probate court.

The estate argues that the public policy of Connecticut strongly favors the granting of allowances, and that they are denied only rarely. It also advances the contention that the probate courts have discretion to determine only the amount of an allowance, and that the courts' decisions are not unbridled, but subject to de novo review in the state's Superior Courts.

Connecticut may well favor allowances for support, but its statute makes no declaration to that effect in absolute terms, and instead provides that probate courts must exercise discretion in the matter. And the fact that probate court determinations concerning allowances are reviewable de novo only underscores the contingent nature of the right to an allowance; no one's right to an allowance is secure until the probate court's order of allowance becomes final. Moreover, that the denial of an allowance may be a statistical rarity is immaterial. The critical inquiry is whether the allowance

in this case was subject to a contingency that might cause it to fail when viewed at the moment of death--not whether the odds in favor of an allowance at that time were impressive.

In short, Connecticut law gives the widow no guarantee of an allowance until the probate court orders it. Viewed at the moment of death, then, the right to an allowance in this case was subject to failure, and nothing in the probate court's subsequent order could cure that deficiency. The decision below should, therefore, be affirmed.

ARGUMENT

I

THE PORTION OF THE CHARITABLE REMAINDER INTEREST THAT WAS SUBJECT TO INVASION FOR THE "BENEFIT" OF THE INCOME BENEFICIARIES WAS NOT PRESENTLY ASCERTAINABLE, AND HENCE NOT DEDUCTIBLE FROM THE DECEDENT'S GROSS ESTATE UNDER SECTION 2055 OF THE INTERNAL REVENUE CODE OF 1954

A. The applicable principles of federal estate tax law

The first issue on this appeal is whether the full present value of the decedent's charitable remainder bequests qualifies for the estate tax deduction granted by Section 2055 of the Internal Revenue Code of 1954, Appendix, infra, as the estate contends, or whether the bequests are deductible only to the extent that they were free of the power of invasion the decedent established in his will, as we contend the District Court correctly held. Section 2055 allows a deduction from the gross estate for the value of certain charitable bequests made by the decedent. Under long-standing Treasury Regulations, the deduction is allowable for a remainder interest in a trust only if (1) the value of that charitable interest is "presently ascertainable, and hence severable from the noncharitable interest," and (2), the possibility that the charity will not actually receive the interest is "so remote as to be negligible." Treasury Regulations on Estate Tax (1954 Code), §20.2055-2, Appendix, infra.4/

4/ As this Court has observed (City Trust Co. v. United States, 497 F. 2d 716, 717, fn. 1 (1974)), the law governing the deductibility of charitable remainder interests was changed by the Tax Reform Act of 1969. This case, however, is governed by the law as it existed prior to the enactment of that legislation, since the decedent here died before December 31, 1969.

The principles to be applied in determining the deductibility of charitable remainders have been carefully delineated by the Supreme Court on several occasions.[5/] As each of the decisions by the Court demonstrates, these principles must be stringently applied to insure that the amount taken as a deduction from the gross estate comports with what eventually passes to the charity. If the interest which is claimed to be deductible is subject to a trustee's power of invasion, the first prerequisite for deductibility is that the power be governed by an objective standard--one that is "fixed in fact and capable of being stated in definite terms of money." Ithaca Trust Co. v. United States, 279 U.S. 151, 154 (1929). Only where the conditions governing the extent of invasion are thus "fixed by reference to some readily ascertainable and reliably predictable facts" will the value of the bequest become adequately measurable and hence, "presently ascertainable" within the meaning of the Regulations, supra. Merchants National Bank v. Commissioner, 320 U.S. 256, 261 (1943). Absent such an objective standard limiting the power of invasion, the charitable deduction will not be allowed, "however remote or tenuous the possibility of invasion might be. Henslee v. Union Planters Bank, 335 U.S. 595, 599 * * * (1949) * * *." Salisbury v. United States, 377 F. 2d 700, 703 (C.A. 2, 1967). And, more to the point in the present case, if any part of a charitable remainder interest is subject to being diverted

5/ Humes v. United States, 276 U.S. 487 (1928); Ithaca Trust Co. v. United States, 279 U.S. 151 (1929); Merchants National Bank v. Commissioner, 320 U.S. 256 (1943); Henslee v. Union Planters Bank, 335 U.S. 595 (1949); Commissioner v. Sternberger's Estate, 348 U.S. 187 (1955).

by the exercise of such an ungoverned trustee power, the deduction is limited to the portion of the interest that is exempt from the exercise of the power. Treasury Regulations, §20.2055-2(b), Appendix, _infra_; _Merchants National Bank_ v. _Commissioner_, _supra_, p. 260.

The question whether given powers of invasion satisfy the requisite objective standard of measurability has been the subject of extensive litigation, and the basic ground rules have been established in the course of numerous judicial decisions. Apart from instances in which invasions are permitted only for defined physical or educational needs or economic emergencies (see _Salisbury_ v. _United States_, _supra_, p. 704), an objective standard has generally been found to be present only when the trustee's power to invade principal is fixed by reference to the income beneficiary's standard of living as of the time of the testator's death. An express statement of this standard was approved in _Ithaca Trust Co._ v. _United States_, _supra_, p. 154 (invasion permitted for such sums as "may be necessary to suitably maintain * * *[the income beneficiary] in as much comfort as she now enjoys"), but the standard has also been found by implication from the terms of the governing instrument, as in _Lincoln Rochester Trust Co._ v. _Commissioner_, 181 F. 2d 424 (C.A. 2, 1950) (invasion for those sums necessary for the income beneficiary's "proper care, support and maintenance"). By contrast, "a fixed standard has been found wanting where the terms used are vague and uncertain and do not restrict invasion to maintain a prior mode of living or to definitely ascertainable amounts."

Newton Trust Co. v. Commissioner, 160 F. 2d 175, 179 (C.A. 1, 1947). See also Salisbury v. United States, supra, pp. 703-704; Hartford National Bank & Trust Co. v. United States, 467 F. 2d 782, 784-786 (C.A. 2, 1972).

In sum, if a trustee has the power to divert the corpus of a charitable trust for the benefit of a noncharitable life beneficiary, no deduction will be allowed unless the limits of the trustee's power are fixed by an ascertainable standard--unless the terms of the instrument serve "to guarantee preservation of any predictable fraction of the corpus for disposition after the * * * [income beneficiary's] death." Henslee v. Union Planters Bank, supra, 598-599, fn. 3.[6/] The standard governing the power to invade a portion of the corpus in this case admits of no such guarantee.

B. The trustees' power to invade the trust corpus to a prescribed extent for the "benefit" of the income beneficiaries is not governed by any fixed standard, and to the extent the charitable remainder interest was thus subject to depletion, it is not presently ascertainable

The decedent's will authorized the trustees to invade principal to the extent of $7,500 per year "To or for the benefit of" his wife, and to the extent of $2,500 per year "To or for the benefit of" his brother. The aggreate amounts of principal distributable to the widow and brother could not exceed $75,000 and $25,000, respectively. Within these limits, the trustees could make invasions whenever "in their sole and uncontrolled discretion, * * * [they deemed it] advisable." (R. 29a.)

6/ Moreover, unless the invasionary power is found to be so delimited, the reviewing court has no occasion to consider the factual question whether the likelihood of invasion is "so remote as to be negligible." See, e.g., Henslee v. Union Planters Bank, supra, 598-599.

The estate advances three arguments for the notion that this power of invasion is governed by an ascertainable standard. It argues, first, that these annual and lifetime dollar limitations by themselves constitute ascertainable standards governing the power to invade (Br. 10-12); second, that the requirement that invasions be made "to or for the benefit" of the income beneficiaries prescribes such an objective standard (Br. 12-13); and third, that the requisite standard is present when the will is construed under relevant Connecticut law (Br. 13-17). None of these contentions has merit.

The contention that the annual and lifetime dollar limits constitute an objective standard is utterly spurious. Those limits merely carve out the portion of the trust corpus--i.e., the aggregate sum of $100,000--which the decedent authorized the trustees to distribute to the income beneficiaries. To the extent the value of the trust corpus was greater than $100,000 as of the decedent's date of death, that excess was exempt from any power of invasion. That excess was thus unquestionably "ascertainable, and hence severable from the noncharitabl interest" within the meaning of Treasury Regulations §20.2055-2(a), and a charitable deduction for this amount has been allowed on audit of the estate tax return in this case.

In short, the estate's argument ignores the issue at hand. Since the decedent's will granted the trustees the power to invade sums totaling $100,000 of trust corpus, the very issue here is whether the will contains a specific, objective standard for the exercise of that power to that the estate can establish, as of the

moment of the decedent's death, a "highly reliable appraisal" (Merchants National Bank v. Commissioner, supra, p. 261) of the portion of that $100,000 that will go to charity. The annual and lifetime maximums do nothing to aid the estate in satisfying that burden; indeed, those maximums are responsible for the imposition of that burden, since they embody the power of invasion in this case. Compare, for example, the analysis in Barry v. Kuhl, 174 F. 2d 565, 567 (C.A. 7, 1949); and see, also, Merchants National Bank v. Commissioner, supra, pp. 260-261.

The estate's discussion (Br. 10-12) of Mowers v. South Carolina National Bank of Greenville, 228 F. 2d 4 (C.A. 4, 1955); Estate of Judge v. United States, 371 F. Supp. 716 (M.D. Pa., 1974); and Estate of Schildkraut v. Commissioner, 368 F. 2d 40 (C.A. 2, 1966), cert. denied, 386 U.S. 959 (1967), is thus totally inapposite. In each of those cases, the trustee was directed to pay the income beneficiary a prescribed amount of money each month from the income of the trust, and to the extent income was insufficient, the payment was to be made from principal. Such a power of invasion is obviously "fixed in fact and capable of being stated in definite terms of money" (Ithaca Trust Co. v. United States, supra, p. 154): the will prescribes the aggregate sum of money that is payable each year to the income beneficiary, and an appraisal of the extent of invasion of corpus may be made by comparing that aggregate with the projected income from the trust. Though the trustees here could distribute no more than $10,000 to the beneficiaries during any

one year (nor more than $100,000 during their lifetime), within those limits the trustees were given virtually unbridled authority to distribute whatever they deemed "advisable"--without regard for the income the beneficiaries received from the trust or any other factor. (R. 29a.) 7/

The estate proceeds to argue, though, that an ascertainable standard is present here because invasions are required to be made "'to or for the benefit' of the lifetime beneficiary." (Br. 12.) Prior decisions have recognized, however, that any invasion is made for the "benefit" of the income beneficiary, 8/ and the "benefit" standard has therefore never been sustained as objective by a court. For example, in Newton Trust Co. v. Commissioner, supra, the trustee was authorized to invade principal "for the use and benefit of" the income beneficiary. Rejecting the contention that this term prescribed an objective standard, the First Circuit stated (160 F. 2d, pp. 179-180):

7/ The estate also seeks refuge (Br. 11) in this Court's comment that the Commissioner was "whipsawing" the taxpayers in Estate of Schildkraut, supra, by taking arguably inconsistent positions with respect to claims for a marital and a charitable deduction. Estate of Schildkraut, supra, p. 45. But that comment is of no assistance to the estate here, since the Court nevertheless acknowleged in Schildkraut that deductions from the gross estate depend entirely on whether the estate satisfies the applicable legal requirements for deductibility. (Ibid.)

8/ Indeed, we submit that the testator here intended to expand--not to limit--the permissible scope of his trustees' discretion when he prescribed that distributions of principal be made "to or for the benefit of" the income beneficiaries. Thus, we believe the phrase was employed merely to empower the trustees to make distributions of principal directly to third parties on behalf of the beneficiaries. Cf. Citizens First National Bank of Ridgewood v. United States, 228 F. Supp. 750, 753, fn. 2 (N.J., 1963). Granting the trustees this power would seem particularly appropriate where, as here, the income beneficiaries are of advanced

> "Use and benefit" considered conjunctively or disjunctively connote considerably more than the maintenance of a [prior] standard of living and to our mind payments for such a purpose or purposes could not lend themselves to predetermined measurement of a measurable standard. * * * The term "benefit" has been said to mean "whatever promotes welfare; advantage, profit." See Helvering v. Evans, 3 Cir., 1942, 126 F. 2d 270, 272, certiorari denied, 1942, 317 U.S. 638 * * *. This alone should serve to point out the indefiniteness of the terms here employed. Granting that this power of invasion does not bestow an unrestricted right to consume the principal, we are still unable to make more than an inaccurate guess at the extent of the power of invasion.

And in National Bank of Commerce of San Antonio v. United States, 369 F. Supp. 990 (W.D. Tex., 1973), affirmed without opinion, 491 F. 2d 1271 (C.A. 5, 1974), where invasion was authorized for the "benefit" of the testator's wife, the court characterized the term "benefit" (369 F. Supp., p. 992) as prescribing a "standard * * * so loose that the trustee is in effect uncontrolled." To the same effect, see Zentmayer's Estate v. Commissioner, 336 F. 2d 488, 491 (C.A. 3, 1964), where invasions were authorized whenever desirable for, inter alia, the "benefit or use" of the income beneficiary.[9/] We submit, therefore, that

8/ (continued)
age and on occasion in need of assistance. (See R. 20a.) In this light, of course, the power of invasion here is governed only by whatever requirements state law would impose upon the trustees as fiduciaries--a standard which is plainly not objective. See Newton Trust Co. v. Commissioner, supra.

9/ Moreover, though this Court faced a very different standard governing the power of invasion in Salisbury v. United States, supra, we believe that the Court plainly indicated its approval of the reasoning of Newton Trust Co. v. Commissioner, supra, when as in this case, a power of invasion is limited only by the permissive standard of "benefit." See 377 F. 2d., pp. 704-408.

the requirement that invasions be made for the "benefit" of the decedent's widow or his brother falls far short of supplying a measurable standard of invasion.

The estate further contends, however, that the will contains an objective standard when construed under Connecticut law. It argues that the will reveals the decedent's "overriding intention" (Br. 16) that the trust corpus be preserved for the benefit of the charitable remaindermen, and that under such circumstances, Connecticut courts would severely limit the trustees' power to invade trust corpus so as to preserve the charitable remainder. (Br. 12-17.)

We agree, of course, that Connecticut law governs the construction of the will in this case. But a Connecticut court would interpret the will in accordance with the intentions of the decedent as he expressed them in that document (see Connecticut Bank and Trust Co. v. Lyman, 148 Conn. 273, 279, 170 A. 2d 130, 133 (1961)), and it becomes obvious on reading the will in this case that the decedent's intentions were not so favorable toward the charitable remaindermen as the estate suggests.

The will demonstrates the decedent's intention that his widow and brother, as well as charity, should benefit substantially from his estate. Thus, he named his widow and brother to receive the income from the trust, and he further directed that if his widow was unwilling or unable to reside in the family homestead, the trustees were to sell the residence and use the sale proceeds to provide his widow with other shelter. (R. 28a, 29a.)

What is most significant, however, is that the decedent granted his trustees the broadest discretion to distribute to his widow and brother the sizeable amounts of trust corpus that are involved in this case. Of course, the decedent did place maximum dollar limits on such invasions, and it may well be that eventually a large portion of his wealth will pass to the charitable remaindermen. But the unalterable fact remains that he visualized that his widow and brother might have need or desire for additional funds, and that he granted his trustees a wide freedom of choice to respond to such desires by making distributions of corpus. To the extent of the broad power of invasion in issue here, the will thus "makes clear that the decedent intended his trustee[s] to prefer * * * [the desires of his widow and brother] over the needs of the charitable remaindermen." City Trust Co. v. United States, 497 F. 2d 716, 718 (C.A. 2, 1974).

Furthermore, because the estate misreads the intentions the testator expressed in his will, it also exaggerates the extent to which Connecticut courts would restrain the trustees' power of invasion. Connecticut courts will not imply an objective standard into a will in order to protect a charitable remainder interest from invasions the testator authorized for an income beneficiary. Indeed, in City Trust Co. v. United States, supra, pp. 718-719, fn. 6, this Court only recently rejected the very contention taxpayers make concerning Connecticut law in this case. (See Br. 13-15.) The Court relied on Connecticut Bank and Trust Co. v. Lyman, 148 Conn. 273, 170 A. 2d 130 (1961), in which the Supreme Court of Connecticut declined to impose any restriction

on the trustee's authority to distribute the entire trust corpus to the income beneficiary upon her written request, even though such a distribution would prevent contingent charitable remaindermen from receiving anything from the trust. In terms completely appropriate here, the Connecticut court stated (148 Conn., p. 278, 170 A. 2d, p. 133): "we cannot rewrite a will or a trust instrument. The expressed intent must control * * *."

Moreover, the holding concerning Connecticut law in City Trust Co. v. United States, supra, is dispositive here despite the contentions the estate makes based on the more recent Connecticut decisions in Connor v. Hart, 157 Conn. 265, 253 A. 2d 9 (1968), and Gimbel v. Bernard F. and Alva B. Gimbel Foundation, Inc., 166 Conn. 21, 347 A. 2d 81 (1974). According to the estate, those decisions establish that trustees do not have dispositive powers under Connecticut law, and that trustees may not exercise their administrative powers so as to favor income beneficiaries over charitable remaindermen. (Br. 14-15.)

But the estate misreads the Connor and Gimbel decisions. Those cases involved only administrative powers of trustees (viz., the power to allocate receipts and expenditures between principal and income); indeed, in each case the Supreme Court of Connecticut took great care to point out that the trustees had been given only administrative and not dispositive powers. See Connor v. Hart, supra, 157 Conn., pp. 273-274, 253 A. 2d, pp. 13-14; Gimbel v. Bernard F. and Alva B. Gimbel Foundation, Inc., supra, 347 A. 2d, pp. 88-89. Thus, while the court construed such administrative powers restrictively--holding that

trustees could not exercise such powers so as to favor private beneficiaries at the expense of charitable beneficiaries--its decisions in Connor and Gimbel have no application to the dispositive power to invade trust corpus in this case.

Hence, it remains clear that a Connecticut court would not restrict the exercise of a power of invasion such as that in this case in order to preserve a charitable remainder. See Connecticut Bank and Trust Co. v. Lyman, supra. Moreover, it is equally clear that in such circumstances, the Connecticut courts would find inapplicable the usual rule that a trustee must act impartially as between successive beneficiaries. Ibid.; cf. National Bank of Commerce of San Antonio v. United States, 369 F. Supp. 990, 992-993 (W.D. Tex., 1973), affirmed without opinion, 491 F. 2d 1271 (C.A. 5, 1974); Newton Trust Co. v. Commissioner, supra.

We submit, therefore, that the power of invasion here is not governed by an objective standard. To the extent the charitable remainder interest is subject to that power, no deduction can thus be allowed. The decision below should therefore be affirmed.[10/]

10/ If this Court agrees with the Government's views, there is no need to reach the estate's arguments (Br. 17-20) concerning the likelihood of invasion here. Should the Court reverse the judgment of the District Court on this issue, however, we submit that a remand would be required for trial of that factual question. See Salisbury v. United States, supra.

II

THE DISTRICT COURT CORRECTLY HELD THAT A WIDOW'S ALLOWANCE GRANTED UNDER CONNECTICUT LAW CONSTITUTES A TERMINABLE INTEREST, AND THUS DOES NOT QUALIFY FOR A MARITAL DEDUCTION UNDER SECTION 2056 OF THE INTERNAL REVENUE CODE

Subsequent to the decedent's death, the Probate Court for the District of Norwalk, Connecticut, awarded his widow a widow's allowance totaling $30,000, and provided that the "allowance shall vest in said spouse and shall not terminate with * * * [her] subsequent death or remarriage." (R. 40a.) The issue on this portion of the estate's appeal is whether this allowance qualifies for the marital deduction under Section 2056 of the 1954 Code, Appendix, infra.

Section 2056(a) provides a deduction from the value of the gross estate in "an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse." The availability of the marital deduction is limited, however, by other portions of Section 2056. The limitation involved here is Section 2056(b) of the Code, which provides that no deduction shall be allowed for a "terminable interest" passing from the decedent to the surviving spouse. A "terminable interest" is defined as one which will terminate or fail, inter alia, "on the occurrence of an event or contingency, or on the failure of an event or contingency to occur." 11/ If a

11/ A terminable interest must satisfy two additional requirements in order to be nondeductible: (1) another interest in the same property must pass or have passed from the decedent to someone other than the surviving spouse for less than a full consideration, and (2), it must appear that such other person will be able to possess or enjoy a part of the property upon the

contingency (e.g., the death or remarriage of the surviving spouse) might cause the surviving spouse's interest in property to terminate or fail, the interest is terminable for purposes of Section 2056, regardless whether the contingency ever actually occurs. Allen v. United States, 359 F. 2d 151, 154 (C.A. 2, 1966), cert. denied, 385 U.S. 832 (1966); S. Rep. No. 1013 (Part 2), 80th Cong., 2d Sess., p. 7 (1948-1 Cum. Bull. 331, 336).12/ And it is settled that the terminability of the surviving spouse's interest in property must be determined according to the attributes of that interest at the moment of the decedent's death. Jackson v. United States, 376 U.S. 503 (1964).

11/ (continued) termination of the surviving spouse's interest. Section 2056 (b)(1), Appendix, infra; Allen v. United States, 359 F. 2d 151, 154 (C.A. 2, 1966), cert. denied, 385 U.S. 832 (1966). These requirements are unquestionably supplied by the provisions of the will in this case. (See R. 27a, 30a-31a.)

12/ S. Rep. No. 1013, supra, explains the terminable interest rule as follows (Id., p. 7 (1948-1 Cum. Bull., p. 336)):

> It is not necessary * * * that the contingency or event must occur or fail to occur in order to make the interest terminable. Thus a terminable interest * * * includes an interest bequeathed to the surviving spouse as long as she resides in Washington, D.C. On the other hand, it includes interests which will in all events terminate, such as estate for the life of the surviving spouse.
>
> * * * [The terminable interest rule] is intended to be all encompassing with respect to various kinds of contingencies and conditions. Thus, it is immaterial whether the interest passing to the surviving spouse is considered as a vested interest subject to divestment or as a contingent interest. [The rule] * * * applies whether the terms of the instrument or the theory of their application are conceived as creating a future interest which may fail to ripen or vest or as creating a present interest which may terminate. The occurrence of a contingency includes the ending

Jackson v. United States, supra, also established that a widow's allowance is a terminable interest whenever the right to the allowance does not become absolutely and unconditionally vested in the widow at the moment of the husband's death. Hamilton National Bank of Knoxville v. United States, 353 F. 2d 930, 931-933 (C.A. 6, 1965), cert. denied, 384 U.S. 939 (1966); Estate of Abely v. Commissioner, 489 F. 2d 1327 (C.A. 1, 1974). In Jackson, the Supreme Court had before it a widow's allowance granted under California law. Under that state's law, the widow did not acquire a vested right to an allowance at the time of her husband's death; in fact, nothing accrued to the widow prior to the time a state probate court granted an allowance. If the widow died or remarried prior to securing an order for an allowance, any right to an allowance was lost. And, if the widow died or remarried after an allowance was granted, the right to subsequent payments of the allowance abated. Jackson v. United States, 376 U.S., pp. 506-507.

The Supreme Court held that such an allowance was a terminable interest, because the widow's interest was not "an indefeasible interest in property at the moment of her husband's death." Id., p. 507. We submit that Connecticut law also does not grant the widow an indefeasible interest in a widow's allowance at the husband's death, and that, as in Jackson, the allowance in this case is therefore a nondeductible terminable interest.

12/ (continued)
of a condition. Thus, an interest given to the surviving spouse as long as she remains unmarried is a terminable interest.

A widow's allowance is authorized by Section 45-250(a), Connecticut General Statutes Annotated, Appendix, infra, which provides that "The court of probate may allow" out of a decedent's estate "such amount as it may judge necessary for the support of the surviving spouse * * * during the settlement of the estate."[13] And Section 45-250(b), Appendix, infra, provides that--

> In making such allowance the court may in its discretion include in its decree * * * (3) a provision that such an allowance * * * shall vest in such spouse retroactively as of the moment of death of his spouse * * * and shall not terminate with the subsequent death or remarriage of the surviving spouse, such allowance to be the absolute property of the surviving spouse, or, if deceased, of the estate of such surviving spouse * * *.

These provisions plainly grant Connecticut probate courts the discretion to decide both whether to permit any allowance to the surviving spouse, and whether to make any such allowance the absolute property of the surviving spouse. And this discretionary--and hence contingent--nature of the widow's allowance has long been recognized by Connecticut courts.

13/ Section 46-12, Connecticut General Statutes Annotated (1976 Supp.), parallels Section 45-250(a) in authorizing an allowance for the surviving spouse. Section 46-12 prescribes the share of the estate a surviving spouse may elect to take in lieu of the provisions of the deceased spouse's will, and further provides that--

> A surviving spouse shall also, when in the opinion of the court of probate it is necessary, be allowed a reasonable sum from such estate for his or her support and for the support of his or her family during the settlement of the estate; but, in that case, such person shall not take his or her statutory share until the expiration of the time for which such allowance is made.

Statutory provisions essentially equivalent to Section 45-250(a) have existed in Connecticut since 1825 (Baldwin v. Tradesmens National Bank, 147 Conn. 656, 661, 165 A. 2d 331, 333 (1960); Havens Appeal, 69 Conn. 684, 698, 38 A. 795, 799 (1897)),[14/] and as early as 1849 the Supreme Court of Errors of Connecticut defined the limited circumstances in which a widow's allowance was to be granted. In denying a widow's allowance in Leavenworth v. Marshall, 19 Conn. 408 (1849), the court observed (pp. 418-419) that--

> * * * courts of probate have long exercised the power of making allowances for the support of a family, when necessary, during the settlement of an estate; and that power has been confirmed by statute. But the power of taking the property of an heir or devisees, and appropriating it for the benefit of others, without the consent of the owner, ought to be cautiously exercised, and never carried beyond the necessary requirements of the case.
>
> The true rule upon the subject is this. Wherever the widow and family of a deceased person have adequate provision made for their support, either by will, or in any other manner they are not entitled to a support out of the shares of others, who are not members of the family.

The Connecticut courts have uniformly treated the allowance as depending upon a determination by the probate court that an allowance is necessary for the widow's support during settlement of the estate. See, e.g., Baldwin v. Tradesmens

14/ A provision similar to Section 45-250(b) was enacted in 1963. See 1963 Public Act 309, Public Acts of the State of Connecticut (1963). Section 45-250 assumed its present form after further amendments to Section 45-250(b) in 1967. See 1967 Public Act 130, Public Acts of the State of Connecticut (1967).

National Bank, 147 Conn., pp. 660, 661-665, 165 A. 2d, pp. 333-334; Leavenworth v. Marshall, supra, Barnum v. Boughton, 55 Conn. 117, 10 A. 514 (1887); Havens Appeal, 69 Conn., pp. 697-701, 38 A. 795, pp. 799-800.[15] Contrary to the estate's intimations (Br. 23-27), the courts have never recognized the existence of a vested right to any allowance until and unless the widow demonstrates to the probate court that her circumstances in the aftermath of the husband's death necessitate a continuation of the support she formerly received from her husband. See, e.g., Baldwin v. Tradesmens National Bank, 147 Conn., pp. 660-663, 165 A. 2d, pp. 333-334; Havens Appeal, 69 Conn., pp. 687-701, 38 A., pp. 799-800; Barnum v. Boughton, supra.[16]

15/ Though the allowance has been characterized as a "statutory right" which the widow can relinquish by agreement (Cowles v. Cowles, 74 Conn. 24, 26, 49 A. 195, 196 (1901)), Connecticut courts have also stated that the widow's right to an allowance is not a "property right" (Baker's Appeal, 56 Conn. 686, 688 (Sup. Ct., 1888)), and that it is not a debt owing from the decedent's estate which is subject to attachment by the widow's creditors (Barnum v. Boughton, supra). See also Staub's Appeal, 66 Conn. 127, 135-137, 33 A. 615, 617 (1895).

16/ As the District Court noted, however (R. 43a-44a), there is dictum in Second National Bank of New Haven v. United States, 222 F. Supp. 446, 451, fn. 16 (Conn., 1963), rev'd on another issue, 351 F. 2d 489 (C.A. 2, 1965), aff'd, 387 U.S. 456, 462 (1967), to the effect that the widow's allowance under Section 45-250, as amended in 1961, would qualify for the marital deduction. But any persuasiveness that dictum might have had has been eroded, since, as the court below further noted (R. 44a), the statute was amended in 1963 and 1967 (see fn. 14, p. 29, supra), and those amendments make the right to a widow's allowance contingent on probate court approval. The estate argues the dictum still has force, because the 1967 amendments were intended to qualify the widow's allowance for the marital deduction (Br. 27-28), but the plain language of the 1961 and 1967 statutes belies that contention. Compare Second National Bank of New Haven v. United States, 222 F. Supp., p. 451, fn. 16. Furthermore, in view of the large measure of discretion that is granted to probate courts by the unambiguous language

Moreover, the Supreme Court of Connecticut only recently reconfirmed the contingent nature of the right to a widow's allowance in Sklar v. Estate of Sklar, 357 A. 2d 900 (1975). The issue in Sklar concerned the validity of a testamentary bequest to a surviving spouse that purported to bar her from receiving any widow's allowance. Even though Sklar was decided well after the 1967 amendments to Section 45-250 (see fn. 14, p. 29, supra), 17/ the court reiterated (357 A. 2d, p. 903) that--

> it is a long established policy of the state now codified by statute that a Probate Court may grant an allowance for the support of a surviving spouse pending settlement of the estate and it is recognized that such an allowance 'is not a property right * * *'; Baker's Appeal, supra, 588: and that the award by order of the Probate Court 'is a discretionary act * * *' [and] 'a matter wholly for the probate court to determine * * *.'

We submit, therefore, that Connecticut law offers no support for the estate's assertions that the widow in this case obtained

16/ (continued)
of the present Section 45-250, we submit that the legislative history of the estate relies on (Br. 39-40) is unpersuasive.

17/ While the opinion in Sklar refers only to the provisions concerning the widow's allowance in Section 46-12 of the Connecticut statutes, the relevant portion of Section 46-12 is essentially identical to Section 45-250(a) (see fn. 13, p. 28, supra), and indeed, the court in Sklar treated the precedents decided under each of the statutes as having coequal application to the issue before it.

an indefeasible right to a widow's allowance at the moment of the decedent's death. (Br. 21, 22, 27.) It is evident that under Connecticut law, the widow's right to an allowance at the time of death remained wholly contingent upon her application to the probate court, and upon that court's granting of an allowance. It is likewise apparent that the estate errs in contending that the discretion possessed by Connecticut probate courts is limited to determining the amount, duration, and method of payment of an allowance. (See Secs. 45-250(b)(1), 45-250(b)(2), and 45-250(b)(3); and Br. 21, 31-32.) Under Section 45-250(a), a probate court may--and in fact must--deny an application for allowance whenever the widow's circumstances indicate an allowance for her support in unnecessary. Leavenworth v. Marshall, supra; see Sklar v. Estate of Sklar, supra; Baldwin v. Tradesmens National Bank, supra. Since the probate court's determination of the widow's need for support necessarily depends upon circumstances developing after the moment of the decedent's death (ibid.), the widow in this case had no absolute right to an allowance at the time of death, and the allowance she subsequently obtained constitutes a terminable interest. Cf. Jackson v. United States, 376 U.S. 503, pp. 507, 508-509 (1964); Estate of Abely v. Commissioner, 489 F. 2d 1327 (C.A. 1, 1974); United States v. Edmondson, 331 F. 2d 676 (C.A. 5, 1964); Rev. Rul. 72-153, 1972-1 Cum. Bull. 309.[18/]

18/ The failure of an allowance under the Connecticut statute to meet the requirements of the marital deduction is further demonstrated by the terms of Section 45-250(b)(4), Appendix, infra. That section authorizes the probate court to provide

The estate contends, however, that Connecticut has a strong public policy favoring widow's allowances, and that the right to an allowance is thus one "which can be defeated only in very rare and unusual circumstances." (Br. 27.) We have little difficulty with the proposition that widow's allowances are viewed favorably in Connecticut. But that policy has not been translated into an absolute legal right which the widow acquires at the time of death, since Section 45-250(a) and its predecessors have long treated the right to an allowance as a matter that is best determined by the probate court in the light of circumstances following the husband's death. Indeed, Section 45-250 (b)(3), Appendix, <u>infra</u>, goes no farther than providing that "the right to seek * * * [an] allowance shall" vest at the moment of death.

Moreover, the fact that the denial of an allowance may be a rare occurrence in Connecticut is not dispositive of the question whether the right to an allowance is a terminable interest. Terminability is determined in light of the contingencies extant at the moment of death, and a terminable interest does not become deductible because it is subsequently shown that those contingencies never actually came to pass. <u>Jackson</u> v. <u>United States</u>, <u>supra</u>.

18/ (continued)
that a widow's allowance be charged against her right to receive income the estate may earn during settlement. Thus, it is quite possible at the time of death that an allowance will not even be charged against the principal of the estate, i.e., that the allowance will not even consist of property included in the decedent's gross estate. See Sec. 2056(a) of the 1954 Code.

The estate also seeks support from the fact that the probate court does not possess absolute discretion in passing on an application for an allowance, but merely a "legal discretion" that is reviewable in a trial de novo in the Superior Court of Connecticut. (Br. 23, 32.) If anything, though, such broad reviewability heightens the contingent nature of the right to an allowance at the time of death. Superior Court review de novo of an application for allowance (Sklar v. Estate of Sklar, supra; Prince v. Sheffield, 158 Conn. 286, 299, 259 A. 2d 621, 627 (1969)) means that the right to an allowance cannot possibly ripen until the probate court's determination in favor of an allowance becomes a final order. A fortiori, that right is not absolute at the moment of death.

Furthermore, it is apparent that the provisions of Section 45-250(b)(3), Appendix, infra, do nothing to alter the contingent nature of the right to an allowance in this case. While that section authorizes the probate court to provide that an order for allowance shall be retroactive to the date of death, and that the allowance shall not terminate on the subsequent death or remarriage of the widow, the court is expressly given the discretion to decide whether to include such provisions in an order granting an allowance. Section 45-250(b). Hence, even assuming the probate court had made the allowance in this case retroactive to the date of the decedent's death--an assumption that the estate incorrectly treats as fact (Br. 32-33; compare R. 40a)-- the fact

remains that at the date of the decedent's death, there could be no assurance that the probate court would do so.[19/] And as the District Court noted (R. 45a), the right to a widow's allowance was also fatally conditional at the moment of death because it was not then certain whether the probate court would exercise its discretion to make the allowance nonterminable upon the widow's subsequent death or remarriage. Cf. Jackson v. United States, supra.[20/]

Unlike the estate, therefore (Br. 31-32), we think this Court's decision in Allen v. United States, 359 F. 2d 151 (1966),

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19/ We note, moreover, that a retroactive order of allowance in this case would be materially different from the retroactive operation of the right of commuted dower involved in decisions such as United States v. Crosby, 257 F. 2d 515 (C.A. 5, 1958). Under such decisions, the right to commuted dower is viewed as an alternative to the right of dower which vests in the widow at the moment of the husband's death. The widow's interest in the property received as commuted dower is deemed to vest as of the moment of death since the property represents the enforcement of an absolute right she acquired at death. That interest is thus considered nonterminable. Id., p. 519; Hawaiian Trust Co. v. United States, 412 F. 2d 1313, pp. 1317-1318 (Ct. Cl., 1969). By contrast, a Connecticut widow's allowance can never be retroactive to the time of death, inasmuch as there is no absolute right to the allowance arising at that time; it is retroactive only if the probate court in its discretion so provides. And that the probate court may exercise its discretion so as to make the allowance retroactive does not make the interest deductible, since the right to an allowance was still conditional at the moment of death. See Jackson v. United States, pp. 509-510.

20/ Thus, if the probate court had failed to incorporate such a provision in the allowance here (R. 40a), Section 45-250(b)(3) implies that the widow's death or remarriage would have abated the right to future payments under the award. Though we are aware of no Connecticut decision which concerns the effect of death or remarriage on the right to an allowance (compare Havens Appeal, 69 Conn. 684, 686, 38 A. 795, 796 (1897)), loss of the right upon either of those events would seem to be mandated by the fact that the sole purpose of the widow's allowance is to continue needed support for the widow. Cf. Sklar v. Estate of Sklar, supra; Barnum v. Boughton, 55 Conn. 117, 118-119, 10 A. 514, 514-515 (1887); Estate of Abely v. Commissioner, 489 F. 2d 1327 (C.A. 1, 1974).

cert. denied, 385 U.S. 832 (1966), is apposite here. In Allen, the surviving spouse received the larger of two alternative bequests that had been made to her in the decedent's will. In order to receive that bequest, the widow had had to satisfy the requirements of the will that she execute an agreement concerning her testamentary disposition of the property, and that she obtain the Surrogate Court's approval of the agreement. Viewing the situation at the date of the decedent's death, this Court held that the bequest was a terminable interest, not only because the bequest was contingent on the widow's choice between alternatives under the will, but also because the bequest was contingent upon the probate court's approval of the agreement. 359 F. 2d, pp. 154-155.

The situation in this case is closely analogous. While the decedent's widow obtained the right to seek an allowance at the time of his death, her right to an allowance itself remained subject to the contingencies that the probate court would not grant any allowance, and that the court would not make the allowance nonterminable if the widow should subsequently die or remarry. Allen, therefore, fully supports the decision below.

On the other hand, neither Estate of Green v. United States, 441 F. 2d 303 (C.A. 6, 1971), nor any of the other decisions discussed at pp. 29-31 of the estate's brief, applies here. In Estate of Green, the Sixth Circuit allowed the deduction of a widow's allowance under Michigan law because it concluded that

Michigan's statutory and decisional law treated the right to a year's allowance as absolutely vested in the widow at the moment of the husband's death. _Estate of Green_, _supra_, p. 306. Similarly, the widow's right to commuted dower was found to be absolutely vested at the time of death in the dower cases the estate cites (Br. 30-32), _Hawaiian Trust Co._ v. _United States_, 412 F. 2d 1313 (Ct. Cl., 1969), and _First National Exchange Bank of Roanoke_ v. _United States_, 335 F. 2d 91 (C.A. 4, 1964); see also fn. 19, p. 35, _supra_.

These decisions demonstrate that where the widow's interest in property becomes absolutely vested at the time of death, the fact that she may fail to invoke the subsequent legal proceedings required to enforce the interest in not a contingency sufficient to render her interest terminable. _Estate of Green_, _supra_, pp. 307-308; _Hawaiian Trust Co._ v. _United States_, _supra_, pp. 1313-1314, 1317-1318. It is evident from our earlier discussion, however, that that rule is inapplicable here: the surviving spouse acquires no right to an allowance under Connecticut law until the probate court decides that her circumstances during the settlement of the estate make an allowance necessary for her support. The estate's reliance on cases in which the widow's interest is indefeasibly vested at death is thus misplaced. See _Hamilton National Bank of Knoxville_ v. _United States_, 353 F. 2d 930, 932-933 (C.A. 6, 1965), cert. denied, 384 U.S. 939 (1966); _Estate of Abely_ v. _Commissioner_, 489 F. 2d 1327 (C.A. 1, 1974).

Nor is there persuasiveness to the estate's contention that the caveat against narrow construction of the marital deduction provisions articulated in Northeastern Pennsylvania National Bank & Trust Co. v. United States, 387 U.S. 213, 221 (1967), has application here. (Br. 33.) That observation concerned only Section 2056(b)(5) of the Code, and resulted from the Court's view that because Congress had acted to expand the scope of the deduction permitted under Section 2056(b)(5) following the original enactment of the marital deduction, the Treasury Regulation under that statute was too narrow an interpretation of legislative purpose. (Id.) The Court's point has no significance in this case, however, because as the Court explained in Jackson v. United States, 376 U.S., pp. 509-511, the history of Congressional action concerning widow's allowances consists of withdrawing more liberal provisions for the deduction of such allowances and subjecting them to "the conditions and limitations of * * * [the terminable interest rule]" (376 U.S., p. 506).21/

21/ Before 1950, widow's allowances were treated as an expense of administration, deductible under Section 812(b)(5) of the Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.) to the extent reasonably required and actually expended for the widow's support. Section 812(b)(5) was repealed in 1950 (in Section 502 of the Revenue Act of 1950, c. 994, 64 Stat. 906), because, among other reasons, Congress concluded that the deduction had resulted in discrimination in favor of estates located in states authorizing liberal support allowances. S. Rep. No. 2375, 81st Cong., 2d Sess., p. 56 (1950-2 Cum. Bull. 483, 525). But in repealing Section 812(b)(5), Congress did not modify the marital deduction to accord favorable treatment to widow's allowances; instead, as S. Rep. No. 2375, supra, stated (p. 130 (1950-2 Cum. Bull., p. 576)), such allowances were to be subjected to "the conditions and limitations of * * * [Section 2056" to qualify for the marital deduction. And as the Supreme Court noted in Jackson (376 U.S.,

Indeed, if there were any uncertainty whether the language in Northeastern was a departure from the Court's close reading of the statutory requirements of the marital deduction in Jackson, the Court itself resolved the matter only two weeks after the Northeastern decision in Commissioner v. Estate of Bosch, 387 U.S. 456 (1967). There, a majority of the Court stated (id., p. 464) that "we believe * * * [Congress] intended the marital deduction to be strictly construed and applied." Accord, Estate of Wycoff v. Commissioner, 506 F. 2d 1144, 1149 (C.A. 10, 1974), cert. denied sub nom. Zions First National Bank v. Commissioner, 421 U.S. 1000 (1975).

We submit, therefore, that there is no warrant in the language of the Northeastern decision--nor in any other authority the estate can furnish--for a departure in this case from the principles of Jackson. See also Allen v. United States, supra, pp. 153-154. The decision below should be affirmed.

21/ (continued)
p. 510), Congress has twice failed to approve amendments to Section 2056 to liberalize the marital deduction for widow's allowances following the 1950 repeal of Section 812(b)(5).

CONCLUSION

For the foregoing reasons, the judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this 14th day of July, 1976, in an envelope, with postage prepaid, properly addressed to him as follows:

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APPENDIX

Connecticut General Statutes Annotated (1976 Supp.):

§45-250. Allowance for support of surviving spouse and family. Family car

(a) The court of probate may allow out of any real or personal estate of a deceased person in settlement before such court such amount as it may judge necessary for the support of the surviving spouse or family of the deceased during the settlement of the estate.

(b) In making such allowance the court may in its discretion include in its decree ordering such allowance any one or more of the following provisions, to the extent they are not mutually inconsistent:

(1) A provision that such allowance shall run (A) for the entire period the estate is in settlement, or (B) for a fixed period of time not to exceed the period of settlement, in which case such allowance shall be subject to renewal by the court in its discretion;

(2) a provision that such allowance is to be paid in a lump sum;

(3) a provision that such an allowance made for a surviving spouse shall vest in such spouse retroactively as of the moment of death of his spouse so that it will be a fixed sum certain as of said date of death and shall not terminate with the subsequent death or remarriage of the surviving spouse, such allowance to be the absolute property of the surviving spouse, or, if deceased, of the estate of such surviving spouse, without restriction as to use, encumbrance or disposition and for the purpose of this section, the right to seek such a vested allowance shall be a vested right as of the date of death of the deceased spouse, and

(4) a provision that such allowance shall be charged ultimately in whole or in part against any right the surviving spouse or other family member for whom an allowance is ordered may have to the income of the estate earned during the period of settlement. (c) The court may also allow for the use during the settlement of the estate by such surviving spouse or family of any motor vehicle maintained by the decedent during his lifetime as a family car.

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 2055. TRANSFERS FOR PUBLIC, CHARITABLE, AND RELIGIOUS USES.

(a) In General.--For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made before the date prescribed for the filing of the estate tax return)--

* * *

(2) to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

* * *

SEC. 2056. BEQUESTS, ETC., TO SURVIVING SPOUSE.

(a) Allowance of Marital Deduction.--For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) Limitation in the Case of Life Estate or Other Terminable Interest.--

(1) General rule.--Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest--

(A) if an interest in such property passes or has passed (for less than a adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under subparagraphs (A) and (B))--

(C) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For purposes of this paragraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

* * *

Treasury Regulations on Estate Tax (1954 Code) (26 C.F.R.):

§20.2055-2 Transfers not exclusively for charitable purposes.

(a) Remainders and similar interests. If a trust is created or property is transferred for both a charitable and a private purpose, deduction may be taken of the value of the charitable beneficial interest only insofar as that interest is presently ascertainable, and hence severable from the noncharitable interest. Thus, in the case of decedents dying before January 1, 1970, if money or property is placed in trust to pay the income to an individual during his life, or for a term of years, and then to pay the principal to a charitable organization, the present value of the remainder is deductible. See paragraph (e) of this section for limitations applicable to decedent s dying after December 31, 1969. See paragraph (f) of this section for rules relating to valuation of partial interests in property passing for charitable purposes.

(b) Transfers subject to a condition or a power. If, as of the date of a decedent's death, a transfer for charitable purposes is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that the charitable transfer will not become effective is so remote as to be negligible. If an estate or interest has passed to or is vested in, charity at the time of a decedent's death and the estate or interest would be defeated by the subsequent performance of some act or the happening of some event, the possibility of occurrence of which appeared at the time of the decedent's death to be so remote as to be negligible, the deduction is allowable. If the legatee, devisee, donee, or trustee is empowered to divert the property or fund in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, the deduction will be limited to that portion, if any, of the property or fund which is exempt from the exercise of the power.

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§ 20.2056(a)-2 Marital deduction: "deductible interests" and "nondeductible interests".

(a) Property interests which passed from a decedent to his surviving spouse fall within two general categories: (1) Those with respect to which the marital deduction is authorized, and (2) those with respect to which the marital deduction is not authorized. These categories are referred to in this section and other sections of the regulations under section 2056 as "deductible interests" and "nondeductible interests", respectively (see paragraph (b) of this section). * * *

(b) An interest passing to a decedent's surviving spouse is a "deductible interest" if it does not fall within one of the following categories of "nondeductible interests":

* * *

(4) A property interest passing to a decedent's surviving spouse which is a "terminable interest", as defined in § 20.2056(b)-1, is a "nondeductible interest" to the extent specified in that section.

§ 20.2056(b)-1 Marital deduction: limitation in case of life estate or other "terminable interest".

(a) In general. Section 2056(b) provides that no marital deduction is allowed with respect to certain property interests, referred to generally as "terminable interests," passing from a decedent to his surviving spouse. The phrase "terminable interest" is defined in paragraph (b) of this section. * * *

(b) "Terminable interests". A "terminable interest" in property is an interest which will terminate or fail on the lapse of time or on the occurrence or the failure to occur of some contingency. Life estates, terms for years, annuities, patents, and copyrights are therefore terminable interests. However, a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity or a term for years, is not a terminable interest.

(c) Nondeductible terminable interests. (1) A property interest which constitutes a terminable interest, as defined in paragraph (b) of this section, is nondeductible if--

(i) Another interest in the same property passed from the decedent to some other person for less than an adequate and full consideration in money or money's worth, and

(ii) By reason of its passing, the other person or his heirs or assigns may possess or enjoy any part of the property after the termination or failure of the spouse's interest.

* * *

(e) Miscellaneous principles. (1) In determining whether an interest passed from the decedent to some other person, it is immaterial whether interests in the same property passed to the decedent's spouse and another person at the same time, or under the same instrument.

(2) In determining whether an interest in the same property passed from the decedent both to his surviving spouse and to some other person, a distinction is to be drawn between "property", as such term is used in section 2056, and an "interest in property". The term "property" refers to the underlying property in which various interests exist; each such interest is not for this purpose to be considered as "property".

* * *

(g) Examples. The application of this section may be illustrated by the following examples, in each of which it is assumed that the property interest which passed from the decedent to a person other than his surviving spouse did not pass for an adequate and full consideration in money or money's worth:

* * *

Example (8). Assume that pursuant to local law an allowance for support is payable to the decedent's surviving spouse during the period of the administration of the decedent's estate, but that upon her death or remarriage during such period her right to any further allowance will terminate. Assume further that the surviving spouse is sole beneficiary of the decedent's estate. Under such circumstances, the allowance constitutes a deductible

interest since any part of the allowance not receivable by the surviving spouse during her lifetime will pass to her estate under the terms of the decedent's will. If, in this example, the decedent bequeathed only one-third of his residuary estate to his surviving spouse, then two-thirds of the allowance for support would constitute a nondeductible terminable interest.

§ 20.2056(e)-2 Marital deduction: definition of "passed from the decedent to his surviving spouse".

(a) In general. * * *

*   *   *

An allowance or award paid to a surviving spouse pursuant to local law for her support during the administration of the decedent's estate constitutes a property interest passing from the decedent to his surviving spouse. In determining whether or not such an interest is deductible, however, see generally the terminable interest rules of § 20.2056 (b)-1 and especially example (8) of paragraph (g) of that section.

*   *   *

§ 20.2056(e)-3 Marital deduction: definition of "passed from the decedent to a person other than his surviving spouse".

The expression "passed from the decedent to a person other than his surviving spouse" refers to any property interest which, under the definition stated in § 20.2056 (e)-1 is considered as having "passed from the decedent" and which under the rules referred to in § 20.2056(e)-2 is not considered as having "passed from the decedent to his surviving spouse." * * * Whether or not there is a possibility that the "person other than his surviving spouse" (or the heirs or assigns of such person) may possess or enjoy the property following termination or failure of the interest therein which passed from the decedent to his surviving spouse is to be determined as of the time of the decedent's death.